

Appeal from a decision of the Alaska State Office, Bureau of Land Management, denying request for small miner exemption and denying request for refund of mining claim rental fees. AA 38998 through AA 39004.

Affirmed in part and reversed in part.

1. Mining Claims: Abandonment--Mining Claims: Rental or Claim Maintenance Fees: Small Miner Exemption

A decision denying a small miner exemption on the grounds that the claimant owns more than 10 claims is properly reversed where the claimant shows that he filed certifications of exemption for the 1993 and 1994 assessment years on Aug. 24, 1993, listing only seven claims and other evidence demonstrates that he had abandoned any additional claims previously held as of Aug. 31, 1993.

2. Mining Claims: Rental or Claim Maintenance Fees: Generally

A mining claimant is not precluded from paying rental fees in addition to filing for a small miner exemption, but he is not entitled to a refund, except as provided in 43 C.F.R. § 3833.0-5(v)(2) (1993), regardless of the fact that BLM improperly denied his small miner exemption.

APPEARANCES: Anson L. Renshaw, Jr., Anchorage, Alaska, pro se.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Anson L. Renshaw, Jr., on his own behalf, and on behalf of co-owner Lena Thoni-Brown, has appealed from a May 11, 1994, Decision of the Alaska State Office, Bureau of Land Management (BLM), denying a small miner exemption from payment of rental fees for the 1993 and 1994 assessment years as required by the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993 (Act), Pub. L. No. 102-381, 106 Stat. 1378-1379 (1992), and implementing regulations. The Decision also denied Appellant's request for refund of the rental fees paid for the 1993 and 1994 assessment years.

On August 24, 1993, Appellant filed with BLM a Certification of Exemption From Payment of Rental Fee (certification of exemption) for assessment year 1993, a certification of exemption for assessment year 1994, and rental fees in the amount of \$1,400. The certifications of exemption were filed in lieu of paying the annual rental fee of \$100 for each claim for assessment years 1993 and 1994 under a provision of the Act known as the small miner exemption which waived the rental fee upon a showing, *inter alia*, that the claimant held no more than 10 mining claims.

Both certifications listed the Sparling Placer No. 1 through Sparling Placer No. 4 (AA-38998 through AA-39001), 5 Sparling Placer (AA-39002), 6 Sparling Placer (AA-39003), and the Sparling Number 7 (AA-39004) mining claims, and both contained a hand-written note stating that "[t]he minority interest owner, Anson L. Renshaw Jr., has a 1/3 minority interest in 8 other Federal mining claims (AA-39149 through AA-39156) for which access has been denied under ANILCA [Alaska National Interest Lands Conservation Act]." On the certification of exemption for the 1994 assessment year, the notation adds that "no certification, nor rental payment, is contemplated under the Act of 10/5/92" for the other eight claims.

By letter dated March 28, 1994, Appellant advised BLM that he had made the required filings under the Act in order to obtain the exemption from rental payment, and requested that BLM expedite issuance of the certificates of exemption and refund the rental fees of \$1,400.

The BLM Decision of May 11, 1994, stated that in order to qualify for an exemption from the rental fee requirements, 43 C.F.R. § 3833.1-6(a)(1) (1993) required that a small miner hold 10 or fewer claims. Because BLM records indicated that on August 31, 1993, Appellant held an interest in 15 active Federal mining claims, BLM denied Appellant's request for a small miner exemption.

As to Appellant's request for a refund, BLM's Decision concluded that the rental fees were not returnable under 43 C.F.R. § 3833.0-5(v)(2) (1993), because the claims were not deemed null and void *ab initio* or abandoned and void at the time the rental fees were paid.

On appeal, Appellant asserts that he did not exceed the 10-claim limitation because the other eight mining claims (AA-039149 through AA-039156) were abandoned effective August 31, 1993. Appellant explains that no rental fees were paid or small miner exemption applications filed for these claims by August 31, 1993. Furthermore, he states that no affidavit of assessment work was filed with BLM for the assessment year ending September 1, 1993, and no notice of intent to hold these claims during the assessment year subsequent to September 1, 1993, was filed with BLM. Appellant states that he filed the rental fees so that if his request for exemption was denied, his claims would not be forfeited, and asserts that the rental fees should be refunded because he qualifies for a small miner exemption.

[1] The Board has recently addressed the question of whether mining claims not listed on a certification of exemption have been abandoned. See, e.g., William J. Montgomery, 138 IBLA 31 (1997); Burbank Gold, Ltd., 138 IBLA 17 (1997); The Big Blue Sapphire Co., 138 IBLA 1 (1997). In those decisions we held that

[s]o long as a claimant who sought a small miner exemption can establish that, with respect to any claims in excess of 10, the elements of abandonment predated August 31, 1993, he or she has met the statutory and regulatory requirements with respect to the limitation on claim ownership, regardless of the point in time at which these facts are communicated to BLM.

The Big Blue Sapphire Co., *supra*, at 5.

In Calvin W. Barrett, 134 IBLA 356 (1996), and Washburn Mining Co., 133 IBLA 294 (1995), we found the evidence of claimant's intent to abandon the "excess" claims in the affidavit of assessment work filed with the county recorder before the August 31, 1993, deadline. However, in Burbank Gold, Ltd., *supra*, at 20, we found that such affidavit

is evidence of intent rather than an act of relinquishment itself. See The Big Blue Sapphire Co., 138 IBLA 1, 5 (1997). As such, we do not consider it essential that affidavit of assessment work be filed before August 31, 1993, however, so long as it is not contradicted later, e.g., by filing an affidavit of assessment work for claims previously dropped by not listing them on an application for exemption. In this case, the evidence of appellant's intent to abandon is that its December 30, 1993, affidavit of assessment work listed the same 10 claims it had listed on its August 30, 1993, application for exemption, and there is nothing in the record that appears to contradict appellant's intent to abandon the claims it did not list on its exemption application. Under these circumstances, we believe appellant qualified for a small miner exemption.

Our holding in Burbank Gold is applicable here. The case file contains two affidavits of assessment work for assessment year 1993. One was filed with the Palmer Recording District on November 19, 1993, and filed with BLM on December 14, 1993. The other was filed with the Palmer Recording District on November 29, 1993, and filed with BLM on December 22, 1993. Both listed the same seven claims that were listed on the certifications of exemption filed on August 24, 1993. Nothing in the record appears to contradict Appellant's intent to abandon the eight claims not listed on his certifications of exemption. Moreover, Appellant's previously cited notations on his certifications demonstrate further evidence of his intent to abandon such claims. Thus, we find that Appellant has clearly demonstrated his intent to abandon, prior to August 31, 1993, those eight claims in excess of those listed on his certifications of exemption. Accordingly, BLM's Decision denying Appellant's request for a small miner exemption must be reversed.

[2] However, regardless of the fact that BLM improperly denied Appellant's application for a small miner exemption, his request for refund of the rental fees must be denied. Under 43 C.F.R. § 3833.1-6(a)(1) (1993), Appellant was not precluded from paying the rental fee in addition to filing for a small miner exemption, but rental fees are not refundable except as provided in 43 C.F.R. § 3833.0-5(v)(2) (1993) which states: "Rental fees are not returnable unless the mining claim or site has been determined, as of the date the fees were paid, to be null and void ab initio or abandoned and void by operation of law."

When the above regulation was published as final, BLM noted in the preamble that it had been suggested that the \$100 rental fee should be refundable. 58 Fed. Reg. 38186, 38189 (July 15, 1993). The BLM responded that the fee will be nonrefundable except as provided in 43 C.F.R. § 3833.0-5, and noted that "[e]ssentially, if the claimant pays the fee and receives the benefit expected from the government (in this case, the claim is held for the period covered by the fee) then the fee is non-refundable." Id.

Applying 43 C.F.R. § 3833.0-5(v)(2) to this case, the seven claims listed in Appellant's certifications of exemption were neither null and void ab initio nor abandoned and void by operation of law. Moreover, Appellant received the benefit of holding the claims for the period covered by the fee. Therefore, BLM's denial of Appellant's request for refund was proper and must be affirmed. See Richard A. Magovich, 133 IBLA 114 (1995).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, that part of BLM's Decision denying Appellant's request for a small miner exemption is reversed, and that part of BLM's Decision denying Appellant's request for a refund of rental fees is affirmed.

John H. Kelly
Administrative Judge

I concur:

James P. Terry
Administrative Judge